REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. 57 OF 2018

ALFRED CHIVATSI CHAI.....1ST APPELLANT

HASSAN SARO.....2ND APPELLANT

VERSUS

MERCY ZAWADI NYAMBU.....RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Cootow Advocates for the Appellants

Ombachi Moriasi Advocates for the respondent

JUDGMENT

This is an appeal from the Judgment of **Hon. R. K. Ondieki (SPM)** delivered on 1.11.2018 after a trial involving the appellants and the respondent in a suit arising out of a Road traffic accident which occurred on 21.5.2011 in which the respondent while travelling as pillion passenger with KMCJ 404 sustained personal injuries, loss and damage.

The respondent sued the appellants for negligence as particularized in paragraph 5 of the Plaint. The appellant filed their respective statement of defence, denying any liability, or loss and damage as pleaded by the respondent.

At the end of the trial, Learned Magistrate determined the twin issues as follows:

a). Liability at 100% as against the appellants

b). General damages at Kshs.200,000/=.

c). Special damages at Kshs.2,500/= plus costs and interest.

Being dissatisfied with the entire Judgment, the appellants through the firm of **Cootow Associates** preferred an appeal on the following grounds:

1. The Learned Senior Principal Magistrate erred in law and fact in holding the appellant at 100% in negligence despite the evidence adduced before the court.

2. The Learned Senior Principal Magistrate erred in failing to take into consideration the evidence of the defence witness and the plaintiff himself while arriving at his decision.

3. The Learned Senior Principal Magistrate erred wholly in disregarding the appellant's counsel submissions and the authorities submitted and proceeded to rely on his own views not backed by law.

4. The Learned Senior Principal Magistrate erred in law in awarding Kshs.200,000/= by way of general damages for the injuries sustained by the plaintiff/respondent which in the circumstances is inordinately high that it must be a wholly erroneous estimate of the injuries sustained by the plaintiff/respondent.

5. The Learned Senior Principal Magistrate erred in failing to analyze and synthesis the evidence before him and arrived at a completely erroneous and excessive finding.

For purposes of the issues before the trial court at the crucial facts were presented by the testimony of the respondent.

In the aforesaid evidence the respondent told the court that the driver of the Boda boda drove it a high speed and as a result occasioned an accident. The fact of the accident therefore stated the respondent became the cause of her physical injuries to the head, waist, arm and shoulder. Besides her testimony by consent the following documentary evidence consisting of a P3 Form, police abstract, medical report by **Dr. Adede, Dr. Sheth,** medical receipts expenses and discharge summary from Kilifi Hospital were admitted without calling the makers as required under the Evidence Act.

Further, the appellants also put in witness statements of one **Alfred Chivatsi Chai,** though he never took the witness stand to give his testimony on oath to be subjected to cross-examination.

In light of the above, both counsels filed their respective submissions which was the basis of the impugned Judgment by the appellants.

At the hearing of this appeal it is apparent from the record that despite several case management directions, it was only the respondent counsel who completed and did file his submissions. Counsel for the respondents argued on the (5) grounds which I can crystallize into two broad issues:

(a). On liability

(b). Quantum.

Learned counsel for the appellant submitted on the two key issues and urged this court to allow the appeal as prayed.

As to who was to blame, Learned counsel for the respondent submitted submitted that the she was a pillion passenger who had no control on the manner of driving. In the pleadings the respondent had alleged that the appellants agent, servant or employee drove the motor cycle number KMCJ 404 without due care and attention, failing to keep proper look over on the road, failing to exercise or maintain proper or effective control of the motor cycle and that as a result a collision occurred and the respondent was injured.

In view of the respondent's counsel there were no mechanical defects found on the motorcycle which would have contributed to the accident. Further, Learned counsel submitted on this issue that by the appellant servant, or employee not being able to keep a considerable distance he rammed into another motor cycle hence the inference on high speed and failure to drive without due care and attention. So far as the record goes the appellant witness view was in control of the motor cycle though he did not testify as to his side of the story on the occurrence of the accident.

The appellants other quarrel with the lower court Judgment was also on assessment of quantum. Learned counsel context was that the evidence by the respondent as presented in court and the medical reports revealed a victim who only suffered soft tissue injuries, not capable of attracting high award as assessed by the Learned Magistrate.

As a result therefore argued counsel an award of Kshs.200,000/= for pain and suffering was erroneous in fact and principle. Learned counsel for the respondent in his submissions disputed the appeal on this point on assessment of damages. That the respondent evidence which was corroborated by the medical doctor's report on the injuries and prognosis provided a good measure that the trial Magistrate applied to award general damages. All these would form the basis of this appeal by the appellant.

Analysis

The following questions arose from the arguments and memorandum of appeal:

1). Whether the respondent was owed a duty of care by the appellants which they failed to perform and that such a failure caused the physical injuries.

2). Whether in that duty the respondent is liable to contributory negligence.

3). Whether the award of general damages assessed by the trial court was punitive and excessive in the circumstances of the case in the 1st instance.

This matter has come before the court as a first appeal from the trial court. The power and jurisdiction exercisable is as stated by **Sir. Clement de Lesting** determined in the case of **Selle v Associated Motor Boat Co. Ltd (1968) E. A. 123 at P 126 - G**

> ***"An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect. In particular, this Court is not bound necessarily to follow the trial Judge's finding of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abudul Hamid Saif v Ali Mohamed Sholan [1955] 22 E.A.C.E. 270]."***

Issue No. 1 and 2 clustered together

It is trite that if anyone suffers personal injuries as a result of wrongful act of another in negligence that other person is liable to compensate the claimant in damages for the loss and damages.

In **Grace v Australian Knitting Mills Ltd [1938] AC 85**

> ***" It is clear that the decision in Donoghurt case treats negligence, where there is a duty to take care, as a specific tort in itself and not simply as, an element in some more complex relationship or some specialized breach of duty, and still less as having any dependence on contract. All that is necessary as a step to establish the tort of action able negligence is to define the precise relationship from which the duty to take care is to be deduced. It is, however essential in English Law that the duty should be established: The mere fact that a man is injured by another's act gives in itself no cause of action. If the act is deliberate, the party injured will have to claim in Law even though the injury is interment, so long as the other party is merely exercising a legal right if the act involves lack of due care, again no case of actionable negligence, will arise witness the duty to careful exists."***

By reason of the said duty of care, the same standard of care underlying the defence of contributory negligence is that people should take reasonable care for their own safety as well that of others. When it comes to contributory negligence and res ipsa loquitor the test can be followed.

In the case of **Benner v Chemical Construction Ltd [1971] 3 ALL ER 822** where the Court of Appeal said in a Judgment by David C. J –

> ***"In my view it is not necessary for the doctrine to be pleaded, if the accident is proved to have happened in such a way that prima facie it could not have happened without negligence on the part of the defendants, that it is for the defendants to explain and show how the accident could have happened without negligence."***

Further in **Lodigelly Iron Coal Co. Ltd v Mcmillan [1934] A.C.**

> ***"The court held it in strict legal analyses negligence means more than heedless or careless conduct whether in omission or commission. It properly connotes the aspect concept of duty, breach and damage thereby suffered by the person to whom the duty was owing."***

Where as in a trial the case before **Hon. Ondieki** which formed the basis of this appeal, for, the appellants to succeed on contributory negligence the following factors ought to be proved on a balance of probabilities:

> ***(a). The probability that the harm would not have occurred if that other person took care to mitigate the loss and damage.***
>
> ***(b). The likelihood of the harm as a result of breach of the duty of care by the tortfeasor.***
>
> ***(c). The nature of the social activity or legal duty, is risk creating activity in which the person owed the duty of care was engaged in.***

In determining contributory negligence Lord Denning in **Jones v Livox Quarries Limited 1952 2 QB 608** where he stated:

> ***"A person is guilt of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable prudent man he might hurt himself and in his reckonings he must take into account the possibility of others being careless."***

The relationship with the tortfeasor and breach of the duty of care. It was submitted in this appeal that the finding by the Learned trial Magistrate on 100% liability was erroneous as between the collision and resultant accident.

A review of the single set of evidence relied upon by the trial court was that of the respondent. She was a pillion passenger on the said motor cycle owned by the appellants. It was stated by the respondent that the motor cycle was travelling at high speed and having swerved collided with another motor cycle. It is somehow amazing of what role the respondent could have played to avoid the accident or loss and damage.

The collusion did not occur because in the sense that the respondent was not wearing a helmet. It may be regarded as a necessary equipment for pillion passengers but cannot be held responsible for causing the accident.

From the evidence the driver of the motorcycle by reason of its operation caused damage to his pillion passengers. It cannot be said that a third party, or intervening factor or an act of God independent of the appellants act or omission. If operating the motorcycle contributed or sole cause of the accident.

I appreciate this ground as raised on appeal by the appellant counsel. That may be so but I do not think there was material in the present case to controvert the testimony of the respondent. The respondent established the causal which on proximate cause and causation between the appellants operation of their motorcycle, the accident and the injury.

Secondly, it is noteworthy that the appellants opted out not to have their witness testify so that his evidence could be challenged in cross-examination by the respondent, in line with Article 50 2 (k) of the Constitution. The witness statement of the motor cycle rider was never a subject of the provisions of Section 145 and 146 of the Evidence Act. The matter therefore as it stands, I find no evidence that the Learned trial Magistrate applied his discretion wrongly in holding that the appellants were wholly liable for the occurrence of the accident in

negligence and breach of the duty of care.

Issue No. 2

On the quantum of general damages, the appellant counsel stated in his memorandum that the assessment was excessive and punitive not compatible with the injuries suffered by the respondent.

The injuries suffered cuts on the forehead, cuts on the back, waist, cut on out left arm, cuts on the right shoulder, cuts in the head.

The trial Magistrate further relied on the medical report by **Dr. Adede** dated 11.6.2011from an examination carried out 21 days after the accident, while **Dr. Sheth** for the appellants also examined the respondent on 30.4.2018 confirming the injuries suffered as a result of the accident.

In his report he opined that the major injury to the head recovered fully with no residual permanent disability. From the record this accident occurred on 21.5.2011 and when **Dr. Sheth** carried out the medical examination and prepared his report about 7 (seven) years after the accident. The initial report of frequent headaches and loss of memory may have subsided or completely healed but that does not lessen the gravity of the injuries sustained by the respondent.

I think the prognosis was more objective by the opinion of **Dr. Adede** who as a consequence evaluated the nature of injuries and residual effect suffered from the accident.

The question is whether the assessment of Kshs.200,000/= for general damages was reasonable. The first dominant principle on assessment of damages that our jurisdiction is that compensation for injuries sustained in an accident injury is never a punishment or penalty against the tortfeasor.

Secondly the previous awards broadly similar in facts should be taken as providing a relevant guide in the assessment of damages, bearing in mind that each case may consist of peculiar features to dissimulate it from the previous award.

On appeal the principles to guide an appellate court as to whether to interfere with the decision of the trial court are well settled and as stated by the Court of Appeal in **Kemfro Africa Limited T/A "Meru Express Services 1976" & Gathogo Kanini v A. M. Lubia & Olive Lubia [1982 – 1988] 1 KAR 727,** where **Kneller J. A.** said:

> ***"The principle to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge in assessing the damage took into account an irrelevant factor, or left out of account a relevant one or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."***

I also find the legal proposition made by **Lord Denning** in **Lin Pho Choo v Camden and Islington Aarea Health Authority [1979] 1 ALL ER 332** which he adopted in **Tayab v Kinanu [1982-88] 1KAR 90.**

> ***"In considering damages in personal injury claims, it is often said: "the defendants are wrongdoers, so make them pay up in full. They do not deserve any consideration." That is a tedious way of putting the case. The accident, like this one, may have been due to a pardonable error much as my befall any of us. I stress this so as to remove the misapprehension, so often repeated, that the plaintiff is entitled to be fully compensated for all the loss and detriment she has suffered. That is not the law. She is only entitled to what is in the circumstances, a fair compensation, fair both to her and to the defendants. The defendants are not wrongdoers. They are simply the people who foot the bill. They are, as the lawyers say, only vicariously liable. In this case it is in the long run the tax payers who have to pay."***

On weighing the evidence on record together with both counsels' submissions, I am enjoined to reevaluate the findings made by the Learned Magistrate with a view to establish whether the award has made was wrong in principle. From the scanty information, deduced from the record by way of the authority referred to by the Learned Magistrate in the case of **Ugenya Bus Service v James Kongo Gachohi, Madam JA** am unable to find out whether the respondent had sustained similar injuries with the one in the **Ugenya Bus Service** case. The other factor is whether on the evidence the respondent was actually entitled to an award of Kshs.200,000/= as reasonable damages for pain, suffering and loss of amenities.

In the instant case, while exercising the appellate jurisdiction, I rely on the following comparative cases as a guide bearing in mind that the assessment of damages is purely a discretionary function. However, it is impossible to precisely come up with a figure that compensates a claimant with a just award for the personal injuries, and loss of amenities arising out of an accident. In accordance with the principal there is similar injuries should as far as possible attract likewise comparable awards for sustainability of uniformity and consistency. In this case, I rely on the following authorities without losing sight that there are no identical claimants who share exactly the same kind of injuries and prognosis.

> ***a). In the case of Philip Musyoka Mutua v Mercy Syoyo [2018] eKLR***
>
> ***The appellant sustained blunt injury to the head, blunt injury to the shoulders, ribs and deep cut wounds to the ankles. The trial court had awarded Kshs.180,000/= and an appeal the award was substituted with that of Kshs.120,000/=.***
>
> ***b). In plaintiff suing as next friend and father of SK v Victor O, Kamadi & Ali Hanahin Motors Ltd the appellant suffered cut***

wound to the forehead, multiple small abrasions to the face, blunt injury to the head leading to loss of conscious for some time, abrasions to the back, cut wound to the right leg an award of Kshs.100,000/=

c). Hantex Garments Ltd v Haron Mwasala Mwakawa [2017] the appellant sustained blunt injuries and tenderness to the leg. The court upheld an award of Kshs.100,000/=.

In all the circumstances going by the medical evidence, and the directive testimony of the respondent the above awards seems to be most fair and appropriate with regard to compensation for the respondent. In my view therefore, the Learned trial Magistrate in considering this issue on award of damages arrived at an incorrect assessment, rendering the award punitive and excessive which ought to be interfered with on appeal. For this reason, I set aside the order of the Learned Magistrate in so far as it relates to assessment on general damages and substitute it with an award of Kshs.130,000/=.

In lieu of the appellant having partially succeeded the cost of this appeal be borne by both parties to the appeal.

On the whole, the respondent is entitled of the final Judgment of this court stated to be in the following terms:

a). Liability at 100% affirmed as per the trial court Judgment.

b). General damages at Kshs.130,000/=

c). Special damages at Kshs.2,500/=

d). Cost and Interests to abide the appeal.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 12TH DAY OF NOVEMBER 2019.

.....

R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. Atyang for Cootow for the Appellant

2. Ms. Omondi holding brief for Ms. Ombachi Advocate for the respondent